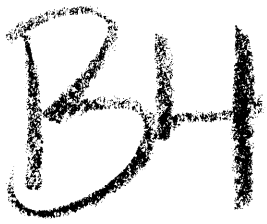

U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, DC 20536

[redacted]

File: WAC 01 175 52175 Office: CALIFORNIA SERVICE CENTER Date: MAY 16 2003

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[redacted]

PUBLIC COPY

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of California in November 1994. It is engaged in the operation of a dry cleaning business. It seeks to employ the beneficiary as its executive director. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established a qualifying relationship with the beneficiary's overseas employer. The director also determined that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the director's decision is in error.

Section 203(b) of the Act states, in pertinent part:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> * * *
>
> (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the

United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is whether the petitioner has established a qualifying relationship with the beneficiary's overseas employer.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

> *Affiliate* means:
>
> (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
>
> (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.
>
> *Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.
>
> *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

The petitioner states, in its letter supporting the petition, that the beneficiary had been continuously employed by its Hong Kong parent company since April 1990. The petitioner also states that both it and its parent company are owned by one individual. The petitioner provides evidence that the Hong Kong company is solely owned by [redacted] The petitioner also provides a copy of its share certificate issued in the amount of 50,000 shares to [redacted] The petitioner further provides a copy of the minutes of the meeting of incorporators dated November 25, 1994 that indicates [redacted] purchased 50,000 shares of the petitioner for $50,000 cash.

The director requested evidence showing the parent company had actually paid for the stock of the United States entity. The director requested original wire transfers, cancelled checks, deposit receipts, or other evidence detailing the monetary amounts paid for the petitioner's stock. The director requested

explanations for all funds not originating with the foreign company.

The petitioner, through its attorney, stated that the sole shareholder had acquired the petitioner's shares with cash transmitted by the shareholder from overseas. The petitioner explained that due to the lapse of time, documentation of this transaction could not be obtained. The petitioner did provide a copy of a bank statement from a San Francisco Bank dated August 11, 1995. The statement showed that [redacted] had opened a bank account on January 5, 1995 had an average two-month balance of $70,000 in the account. The petitioner also noted that it had purchased a dry cleaning establishment in 1996 for $93,000. The petitioner provided a copy of cashier's check for $53,000 from [redacted] made out to the petitioner's attorneys. The petitioner stated that this cashier's check was for the purchase of the dry cleaning establishment.

The director determined that the petitioner had not submitted sufficient evidence to show that funds were exchanged to establish ownership of the petitioner. The director concluded that the petitioner had not shown that all funds came from the parent company abroad; thus, it could not be established that the foreign entity owned the United States entity.

On appeal, counsel for the petitioner states that the director failed to consider that the foreign entity is a sole proprietorship owned 100 percent by the beneficiary and that the beneficiary, through his attorney incorporated the petitioner as a subsidiary company. Counsel continues by asserting that the beneficiary is the owner of 50,000 of the petitioner's shares as indicated by the stock certificate issued by the petitioner. Counsel concludes by asserting that majority stock ownership in both companies is sufficient to establish a qualifying relationship between the United States and foreign entity.

Counsel's assertions are not persuasive. The director and petitioner both attempt to characterize the qualifying relationship as a subsidiary relationship with a parent company or entity holding a majority of shares of a subsidiary company. However, it appears from the actual description that the petitioner is actually asserting an affiliate relationship with a foreign entity. The petitioner originally stated that it and the foreign entity were owned by one individual, a statement that appears to fall within the first part of the affiliate definition. *See* 8 C.F.R. § 204.5(j)(2). However, the petitioner initially provided information only evidencing a paper transaction between the owner of the foreign entity and the petitioner.

Ownership is a critical element of this visa classification and the Bureau may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. Evidence of this nature should include documentation of monies,

property, or other consideration furnished to the entity in exchange for stock ownership. The petitioner was unable to supply this evidence in response to the director's request. The petitioner's explanation, that due to the lapse of time, it was not able to document the transfer of funds for the initial purchase of stock is not sufficient. It is unclear from the record whether the petitioner, rather than the petitioner's alleged individual shareholder, had set up a bank account to enable receipt of the funds at the time the petitioner was incorporated.

Furthermore, counsel's statements on appeal cause further concern regarding the ownership of the petitioner and the overseas entity. The petitioner initially stated that the foreign entity was a sole proprietorship and that the sole proprietor, namely, [redacted] was the owner of all the petitioner's stock. However, counsel indicates on appeal that the beneficiary is the sole shareholder of both entities. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

The record does not establish that the sole proprietor of the foreign entity actually purchased the outstanding stock of the petitioner. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); *see generally Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The record is deficient in establishing a qualifying relationship between the petitioner and the beneficiary's overseas employer.

The second issue in this proceeding is whether the beneficiary will perform primarily managerial or executive duties for the petitioner.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily-
>
> i. manages the organization, or a department, subdivision, function, or component of the organization;
>
> ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the

organization, or a department or subdivision of the organization;

iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

i. directs the management of the organization or a major component or function of the organization;

ii. establishes the goals and policies of the organization, component, or function;

iii. exercises wide latitude in discretionary decision-making; and

iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner initially provided a description of the beneficiary's job duties as follows:

Currently, [the beneficiary] is directing management of our corporation and business through subordinate managerial employees and his duties are primarily executive. His executive duties include setting corporate policy, directing management, making executive discretionary decisions, having control over business and employees through managerial staff, hiring and firing employees, and having regular contact with our parent company on policy and operation of the business both in Hong Kong and the United States. Some of his specific duties are signing contacts [sic], checks, tax

> returns, and legal documents on behalf of the corporation and business; negotiating the acquisition of equipment and leasing of business location; determining terms of employment, including salary raise [sic] and benefit, of individual employees; and negotiating with customers and laundry dealers on terms of service provided to them by us.

The petitioner also stated that it employed two managers, one for each of the dry cleaning locations, two clerks/salespersons, two cleaners/pressers, and a delivery driver, in addition to the beneficiary. The petitioner also noted the alleged sole shareholder was its president and that another individual was its corporate secretary. Neither the president nor the corporate secretary positions appear to be paid positions.

In response to the director's request for a more detailed description of the beneficiary's duties, the petitioner, through its attorney, stated that the beneficiary spent 20 percent of his time setting corporation goals and advising the parent company on business operations in the United States and its further expansion. The petitioner also stated that the beneficiary spent 70 percent of his time directing the management of the corporation. The petitioner included controlling the business of the two locations, hiring and firing employees, determining terms of employment, planning and approving major expenditures of the company, signing contracts, checks, financial documents, tax returns, sales agreements, and other contracts as part of the responsibilities of directing the management of the company. The petitioner stated that the beneficiary spent the remaining 10 percent of his time on business promotion.

The petitioner also provided its California Form DE-6, Quarterly Wage and Withholding Report for the quarter ending June 30, 2001, the quarter in which the petition was filed. The California Form DE-6 showed seven employees in the positions identified as manager (2), cleaner/presser (2), clerk/salesperson (2), and the beneficiary's position of executive director.

The director determined that the petitioner had not established a reasonable need for an executive because it was merely a small seven to nine employee dry cleaning business. The director also determined that because the company only had seven to nine employees the beneficiary would necessarily be performing numerous menial tasks. The director determined that the petitioner also had not provided sufficient evidence to establish that the beneficiary would supervise employees holding professional positions or to show that the beneficiary was a functional manager.

On appeal, counsel for the petitioner states that the statute was not intended to limit managers or executives to persons who supervise a large number of persons or a large enterprise. Counsel also repeats the description previously provided for the

beneficiary's position. Counsel asserts that the Bureau's decision was erroneous because the number of employees supervised by the beneficiary is not determinative.

Counsel's statement and assertion that the size of the petitioner and the number of employees supervised by the beneficiary are not determinative is correct in part. The director's statement that the petitioner does not need an executive because it is a small dry cleaning business is subjective. The director should not hold a petitioner to her undefined and unsupported view of "common business practice" or "standard business logic." The director should, instead, focus on applying the statute and regulations to the facts presented by the record of proceeding. Although the Bureau must consider the reasonable needs of the petitioning business if staffing levels are considered as a factor, the director must articulate some reasonable basis for finding a petitioner's staff or structure to be unreasonable. Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). The fact that a petitioner is a small business or engaged in sales or services will not preclude the petitioner from qualifying for classification under section 203(b)(1)(C) of the Act. The director's decision is withdrawn as it relates to this subjective conclusion.

However, the petitioner in this case has not established that the beneficiary has been or will be primarily performing managerial or executive duties for the petitioner. In examining the executive or managerial capacity of the beneficiary the Bureau will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The initial description of the beneficiary's duties paraphrased elements contained in the statutory definition of managerial and executive capacity, rather than, conveying an understanding of the beneficiary's daily tasks. *See* section 101(a)(44)(B)(i), (ii), and (iii), and 101(a)(44)(A)(ii) and (iii) of the Act. The beneficiary's specific duties of signing contracts, checks, tax returns, and legal documents are duties of an individual acting as an agent on behalf of the corporation. The petitioner has not provided sufficient evidence to support its claim that these duties are primarily executive duties. The beneficiary's duties of negotiating contracts and promoting the business are more akin to an individual providing operational support for the petitioner's business rather than managing or directing the business. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). The petitioner has provided a general description of the beneficiary's duties that does not support a conclusion that the beneficiary is performing in a primarily executive or managerial position.

The record shows that, at the time of filing the petition, the petitioner employed two individuals as "managers" at each of its dry cleaning operations. In addition to each "manager," each dry

cleaning operation had one clerk/salesperson and one cleaner/presser. In addition to the tasks of supervising the employees, the "managers" ensured timely pick-up of clothing by customers and delivery of garments to laundry dealers. The individuals in the clerk/salesperson positions received and returned customers' clothing and the individuals in the cleaner/presser positions cleaned and pressed clothing. The information contained in the record does not support a finding that these individuals hold professional positions. It is not clear from the brief description for the "manager" position that these individuals primarily supervised the two other employees at the dry cleaning establishments rather than primarily participated in the petitioner's operational tasks. The record does not establish that the petitioner's employees subordinate to the beneficiary are primarily managerial or supervisory employees. The Bureau can only conclude from the limited information in the record regarding the petitioner's employees that the beneficiary is performing primarily as a first-line supervisor over non-professional, non-supervisory, and non-managerial employees.

At the time of filing, the petitioner was a five-year-old company that had been involved in operating a dry cleaning establishment for over four years. The firm employed the beneficiary as an "executive director" and employed several other individuals at lower level positions in the dry cleaning operations. As explained above, the record does not provide a clear understanding of the beneficiary's role in the operations of the petitioner. In addition, the roles of the petitioner's other employees appear to be at a lower level requiring the beneficiary to primarily perform the duties of a first-line supervisor as well as negotiate contracts and promote the business. The record does not sufficiently demonstrate that the beneficiary's subordinate employees fulfill the reasonable needs of the petitioner thereby relieving the beneficiary from performing non-qualifying duties. In addition, the number of employees or lack of employees serves only as one factor in evaluating the claimed managerial or executive capacity of the beneficiary. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity. As discussed above, the petitioner has not established this essential element of eligibility.

The petitioner has not established that the beneficiary has been or will be employed in a primarily managerial or executive capacity or that the beneficiary's duties in the proposed position will be primarily managerial or executive duties.

Beyond the decision of the director, the petitioner has not established that the beneficiary was employed by the overseas entity in a managerial or executive capacity prior to entering the United States as a nonimmigrant. The petitioner has not provided a comprehensive description of the beneficiary's duties for the

overseas entity. *See* section 101(a)(44)(A) and (B) of the Act. For this additional reason the petition may not be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.